

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

FARM CREDIT BANK OF TEXAS
Plaintiff

V.

NO. 2:92CV54-B-B

MARY JANE COSBY, E.C. COSBY,
PEARLEAN R. COSBY, JOE HENRY COSBY,
CHARLOTTE COSBY CRAWFORD, ORA LEE
COSBY OLIVER, ALICE COSBY GUYNN,
MARY BELL COSBY GRIFFIN, ABE COSBY,
NAPOLEON COSBY, VANDELLA COSBY BROOKS,
RHENNETT COSBY, ALBERTA COSBY DAVIS,
JUANITA COSBY MILLER, MAXINE COSBY ADAMS,
UNITED STATES OF AMERICA ACTING BY AND
THROUGH UNITED STATES DEPARTMENT OF
AGRICULTURE, and EXXON CORPORATION
Defendants

MEMORANDUM OPINION

This cause comes before the court upon the separate motions of the Cosby defendants¹ (collectively) and the United States of America for summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

This action initially began as a judicial foreclosure filed by Farm Credit Bank, which held a lien of first priority over property belonging to the Cosby defendants. The United States Department of Agriculture held a lien of second priority by virtue of several loans to the Cosbys through the Farmer's Home Administration

¹ The individual defendants named in this action are referred to collectively as the "Cosby defendants." For purposes of this action, they are acting as one.

("FmHA").² The balance due the FmHA as of September of 1994 was in excess of \$400,000.00.

At the initial pre-trial conference held on August 25, 1993, the parties discussed the possibility of settling the debts for a sum total of \$40,000.00, with the Cosbys retaining ownership of the property. The Cosbys were seeking a bank loan to obtain the necessary funds, but were ultimately unsuccessful.

On July 13, 1994, the Cosbys entered into a contract of sale with Ellington Massey, wherein Massey would purchase the Cosbys' property for \$92,000.00. Massey's attorney, Lee Graves, knew of the liens on the property and requested written documentation that Farm Credit Bank and the FmHA would release their liens. On or about July 20, 1994, Lawrence Magdovitz, attorney for the Cosbys at that time, telephoned Ralph Dean and David Burns, attorneys for the FmHA and Farm Credit Bank, respectively, to confirm that the liens would be released for a sum total of \$40,000.00. Magdovitz failed to inform either Dean or Burns of the third party sale. Dean believed that the Cosbys were still attempting to achieve a settlement wherein they could retain ownership of the property.

Sometime between July 20, 1994, and August 15, 1994, Magdovitz requested a letter of confirmation from the FmHA and Farm Credit Bank. Upon receipt of the letters, the Cosbys proceeded with the

² The FmHA held a first lien as to a small parcel of property worth approximately \$4000.00.

third-party sale. On September 7, 1994, just a few days before the sale was consummated, Dean learned of the third-party sale and immediately informed Magdovitz that the FmHA would no longer agree to release its lien.

The parties subsequently agreed, with court approval, to complete the sale to Massey for \$92,000.00. Both the FmHA and Farm Credit Bank released their liens on the property. Farm Credit Bank received \$40,000.00 and was dismissed from this action. The remaining proceeds of the sale were placed in escrow, pending court distribution. Both parties have now filed cross-motions for summary judgment, seeking distribution of the funds.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ.

P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

The Cosbys' debt with the FmHA is secured through several deeds of trust, each of which contains a clause which states that the encumbered property shall not be sold without the written consent of the United States Government. The Cosbys failed to make an application with the FmHA for consent to a third-party sale, and never had the written consent of the United States to transfer the subject property to Massey. The Cosbys knew, or should have known, that the third-party sale violated the terms of the deeds of trust.

Even had application for written consent been made, consent could not have been given, except within the provisions set forth in the Code of Federal Regulations. The C.F.R. provides that the FmHA may compromise a debt to allow the debtor to retain the security if the debtor pays an amount at least equal to the fair

market value of the property. 7 C.F.R. § 1956.66(a)(1). Consent to a third-party sale could only be given if the entire proceeds from the sale were applied to the existing liens in their order of priority. 7 C.F.R. §§ 1965.13(f)(5) and 1965.26(f)(2). Therefore, federal regulations would prevent the sale to Massey unless the entire \$92,000.00 were applied to the liens. The Cosbys are charged with legal notice of these regulations, regardless of their actual knowledge thereof. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-385, 92 L. Ed. 10 (1947).

Hypothetically, even if the Cosbys had notified Dean of the third-party sale, and Dean had given his approval, the agreement would be ineffective, as it would be outside the authority bestowed by the federal regulations. Dean had neither actual nor apparent authority with which to bind the FmHA. The Code of Federal Regulations, of which the Cosbys are charged with legal notice, prevents anyone from having the authority to approve of a third-party sale, unless the entire proceeds are used to satisfy the existing liens. Dean further had no apparent authority to bind the FmHA, as apparent authority is based on the theory of estoppel, Steen v. Andrews, 78 So. 2d 881, 883 (Miss. 1955), which may not be raised against the federal government. Office of Personnel Management v. Richmond, 496 U.S. 414, 419-423, 110 L. Ed. 2d 387, 396-398 (1990); see also Merrill 332 U.S. at 383-386.

The United States Supreme Court considered similar legal issues in Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 92 L. Ed. 10 (1947). Merrill was an Idaho farmer who purchased insurance from the Federal Crop Insurance Corporation, an agency of the federal government, to insure spring wheat that had been reseeded on winter wheat acreage. The applicable federal regulations did not allow insurance for reseeded wheat. However, the local agent representing the United States advised Merrill that the entire crop was insurable. The spring wheat was destroyed and the Federal Crop Insurance Corporation refused to pay the claim, since the wheat had been reseeded on winter wheat acreage. Merrill argued that the government representative had assured him that the entire crop was insurable. The Supreme Court held that the federal regulations were binding upon Merrill regardless of Merrill's actual knowledge thereof. Merrill, 332 U.S. at 384-385. The fact that the government agent assured Merrill that his crop was insurable did not overcome the restrictions in the regulations against insuring reseeded wheat. The Court noted that anyone entering into an agreement with the federal government takes the risk of accurately ascertaining that the government representative stays within the bounds of his authority. Id.

CONCLUSION

For the foregoing reasons, the court finds that the Cosbys' motion for summary judgment should be denied, and the United States

of America's motion for summary judgment should be granted. An order will issue accordingly.

THIS, the _____ day of December, 1996.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE